No. 17-646

# In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court should reinterpret the Double Jeopardy Clause and overturn the long-held understanding that successive prosecutions by separate sovereign governments are not prosecutions for the "same offence." U.S. Const. Amend. V.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 694 Fed. Appx. 750. The order of the district court (Pet. App. 5a-10a) is not published in the Federal Supplement but is available at 2016 WL 3460414.

## JURISDICTION

The judgment of the court of appeals was entered on July 28, 2017. The petition for a writ of certiorari was filed on October 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Alabama, petitioner was convicted of possession of a firearm by a felon, in

violation of 18 U.S.C. 922(g). Judgment 1. He was sentenced to 46 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3.

1. On September 4, 2008, petitioner was convicted in Alabama state court of second-degree robbery. C.A. App. 12, 37. Approximately seven years later, an officer with the Mobile Police Department conducted a traffic stop of petitioner's car after noticing that one of the headlights was out. *Id.* at 49. The officer smelled marijuana coming from inside the vehicle, ordered petitioner out of the car, and conducted a search of the driver's area in the car. *Ibid.* The officer found a loaded handgun, a digital scale, and marijuana. *Ibid.*

On April 28, 2016, a federal grand jury in the Southern District of Alabama returned a one-count indictment charging petitioner with possessing a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Nearly one month later, on May 27, 2016, petitioner was convicted in Alabama state court of being a prohibited person in possession of a firearm, in violation of Ala. Code Ann. § 13A-11-72 (LexisNexis 2005). Pet. App. 5a-6a. The April 2016 federal indictment was based on "the same incident * * * that gave rise to [petitioner's] state court conviction." *Id.* at 6a.

Petitioner moved to dismiss his federal indictment on double jeopardy grounds. The district court denied the motion, concluding that petitioner's argument was foreclosed by binding precedent in this Court and the Eleventh Circuit holding that the federal government is a separate sovereign from an individual state and that the Double Jeopardy Clause does not prohibit separate prosecutions by separate sovereigns. See Pet. App. 5a-10a (citing, *inter alia*, *Abbate* v. *United States*, 359 U.S. 187 (1959), and *United States* v. *Hayes*, 589 F.2d 811

(5th Cir.), cert. denied, 444 U.S. 847 (1979)). The district court stated that, "unless and until the Supreme Court overturns *Abbate*, [petitioner's] Double Jeopardy claim must likewise fail." *Id.* at 10a.

Petitioner subsequently pleaded guilty pursuant to a plea agreement, though he reserved his right to appeal the denial of his motion to dismiss on Double Jeopardy grounds. Plea Agreement 1, 7. On October 18, 2016, the district court sentenced petitioner to 46 months of imprisonment, to run concurrently with his Alabama state sentences for being a prohibited person in possession of a firearm, as well as for discharging a gun into an occupied vehicle and possession of marijuana in the first degree. Judgment 2.

3. In an unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1a-4a. The court explained that this Court had held in *Abbate* "that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns." *Id.* at 2a. The court of appeals further stated that "unless and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine." *Ibid.* (citing *Hayes*, 589 F.2d at 817-818). And the court observed that this Court's recent decision in *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863 (2016), reaffirmed the separate-sovereign doctrine. Pet. App. 3a.

## ARGUMENT

Petitioner contends (Pet. 5-19) that, although his double jeopardy claim is foreclosed by controlling precedent from this Court, see, *e.g.*, *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016), the Court should grant certiorari to reconsider the Double Jeopardy Clause's

dual-sovereignty doctrine. That contention lacks merit. This Court has applied that doctrine numerous times over the span of more than 150 years, and has already considered and rejected many of petitioner's arguments for reconsidering it. See *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); *Bartkus* v. *Illinois*, 359 U.S. 121, 138 (1959). This Court has also repeatedly denied other petitions seeking to reconsider the doctrine, including most recently in *Walker* v. *Texas*, 137 S. Ct. 1813 (2017) (No. 16-636).[1] The Court should do the same here.

1. The court of appeals correctly rejected petitioner's claim that, because he was previously convicted on state charges in Alabama, the Double Jeopardy Clause bars his federal conviction for possessing a firearm while being a convicted felon.

a. The Double Jeopardy Clause provides that no person shall "be subject for the *same offence* to be twice put in jeopardy of life or limb." U.S. Const. Amend. V (emphasis added). As this Court recently reaffirmed in *Sanchez Valle*, 136 S. Ct. at 1867, the Double Jeopardy Clause does not prohibit successive prosecutions by separate sovereigns for offenses that consist of the same elements, because transgressions against the laws of separate sovereigns do not constitute the "same offence," within the meaning of the Double Jeopardy Clause. See *United States* v. *Wheeler*, 435 U.S. 313, 316-318 (1978); see also *Sanchez Valle*, 136 S. Ct. at 1870 (explaining that the Double Jeopardy Clause "drops out of the picture when the 'entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns'") (quoting *Heath*, 474 U.S.

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[1] At least two petitions raising the same question are pending before this Court. See *Tyler* v. *United States*, No. 17-5410 (filed July 27, 2017); *Ochoa* v. *United States*, No. 17-5503 (filed July 31, 2017).

at 88) (brackets in original). The Double Jeopardy Clause thus does not forbid successive prosecutions by a State and the federal government because a State and the federal government are "two sovereignties, deriving power from different sources." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922).

Petitioner recognizes (Pet. 17-19) that this "dual sovereignty" doctrine forecloses his double jeopardy claim in this case. Petitioner contends (Pet. 6-17), however, that this Court should reexamine the line of cases explaining and applying that doctrine on the theory that it is inconsistent with the text and history of the Double Jeopardy Clause. This Court has repeatedly denied other petitions raising that contention. *E.g.*, *Walker*, *supra* (No. 16-636); *Roach* v. *Missouri*, 134 S. Ct. 118 (2013) (No. 12-1394); *Donchak* v. *United States*, 568 U.S. 889 (2012) (No. 12-197); *Mardis* v. *United States*, 562 U.S. 943 (2010) (No. 10-6013); *Angleton* v. *United States*, 538 U.S. 946 (2003) (No. 02-1233); *Sewell* v. *United States*, 534 U.S. 968 (2001) (No. 01-6131); see also *Koon* v. *United States*, 515 U.S. 1190 (1995) (No. 94-1664) (granting certiorari on a sentencing question, but denying review of a challenge to the dual-sovereignty doctrine). It should do the same here.

The dual-sovereignty principle has been "long held," *Sanchez Valle*, 136 S. Ct. at 1870, and "consistently * * * endorsed" by this Court, *Heath*, 474 U.S. at 93, which has recognized its soundness as a matter of "[p]recedent, experience, and reason alike," *Bartkus*, 359 U.S. at 138. The Court explained the roots of the principle more than 150 years ago. See *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852) ("The same act may be an offence or transgression of the laws of both" state and federal governments; "[t]hat either or both may (if

they see fit) punish such an offender, cannot be doubted."). And in 1959, the Court described a challenge to the dual-sovereignty doctrine as "not a new question," having been "invoked and rejected in over twenty cases." *Bartkus*, 359 U.S. at 128-129. The Court stated that to disregard a "long, unbroken, unquestioned course of impressive adjudication" was not only unwarranted, but "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Id.* at 136-137.

This doctrine follows from "the basic structure of our federal system." *Wheeler*, 435 U.S. at 320. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see *Heath*, 474 U.S. at 92 ("It is axiomatic that '[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States.'") (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819)) (brackets in original). Consistent with the constitutional design, the Double Jeopardy Clause does not prohibit prosecutions by both a State and the federal government for the same conduct: "[w]hen a defendant in a single act" breaks the laws of two sovereigns, "he has committed two distinct 'offences'" and can be prosecuted for both. *Heath*, 474 U.S. at 88. Each sovereign is entitled to "exercis[e] its own sovereignty" to "determin[e] what shall be an offense against its peace and dignity" and prosecute the offender "without interference by the other." *Lanza*, 260 U.S. at 382.

Under petitioner's interpretation of the Double Jeopardy Clause, one sovereign's efforts (successful or not) to enforce its own laws would vitiate the other sovereign's similar law-enforcement prerogatives. But that cannot be squared with the Constitution's bedrock structure of governance. As this Court has recognized, "undesirable consequences would follow" if prosecution by any one State could bar prosecution by the federal government. *Abbate* v. *United States*, 359 U.S. 187, 195 (1959). "[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts," the Court has explained, "federal law enforcement must necessarily be hindered." *Ibid.* Similarly, if a federal prosecution could bar prosecution by a State, the result would be a significant interference with the States' historical police powers. See *Heath*, 474 U.S. at 93 ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.").

The dual-sovereignty doctrine thus "finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself." *Heath*, 474 U.S. at 92; see, *e.g.*, *Wheeler*, 435 U.S. at 320, 330 (it rests "on the basic structure of our federal system" and the "very words of the Double Jeopardy Clause"); *Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977) (per curiam) ("[I]n our federal system the State and Federal Governments have legitimate, but not necessarily identical, interests in the prosecution of a person for acts made criminal under the laws of both."). As Justice Holmes stated nearly a century ago, the dual sovereignty doctrine is "too plain to need more than statement." *Westfall* v. *United States*, 274 U.S. 256, 258 (1927).

b. Petitioner contends (Pet. 6-10) that these cases were all wrongly decided because, he asserts, they conflict with the plain text and original meaning of the Double Jeopardy Clause. In so claiming, petitioner largely relies (Pet. 7-8) on English law. But this Court has already considered and rejected that line of argument. In *Bartkus*, this Court described as "dubious" such authorities and stated that they were not "relevant to discussion of our problem." 359 U.S. at 128 n.9. Given our unique constitutional scheme, a doctrine rooted in the powers and obligations of separate State and federal sovereigns will necessarily reflect the "American experience, including our structure of federalism which had no counterpart in England." *United States* v. *Gillock*, 445 U.S. 360, 369 (1980). "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory." *Lanza*, 260 U.S. at 382. As even critics of the dual sovereignty doctrine have recognized, that was not true in England. See, *e.g.*, Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 316 (1963) ("In that country two sovereigns do not have *territorial* jurisdiction over a crime.").

The Court articulated the dual-sovereignty rationale the first time it encountered a situation in which the same conduct could violate different laws from two separate sovereigns. See *Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 435 (1847) ("offences falling within the competency of different authorities to restrain or punish them" are properly "subjected to the consequences which those authorities might ordain and affix to their perpetration"); see also *Moore*, 55 U.S. (14 How.) at 20 (validity of successive state and federal prosecution "cannot be

doubted"); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 569 (1850) (accepting that "the same act might * * * constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either"). And in the century from *Moore* in 1852 to *Bartkus* in 1959, the Court reaffirmed the dual-sovereignty principle 20 times. *Bartkus*, 359 U.S. at 132 & nn.19-20 (collecting cases).

This Court has also considered and rejected petitioners' suggestion (Pet. 7-8) that an early decision from this Court, *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820), is inconsistent with the dual sovereignty doctrine. In *Houston*, the Court upheld a state statute that purported to grant state military courts authority to impose federal sanctions on militiamen who failed to report for federal duty. Justice Washington suggested that if jurisdiction were proper in both state and federal military courts, then final adjudication in one would bar prosecution in the other. *Id.* at 31. But in *Bartkus*, this Court explained that those statements were based on the view that "the state statute [at issue] imposed state sanctions *for violation of a federal criminal law*." 359 U.S. at 130 (emphasis added). Accordingly, this Court concluded in *Bartkus*, *Houston* "can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Ibid.*

c. Petitioner contends (Pet. 10-14) that this Court's subsequent decision to apply the Double Jeopardy Clause to the States has undermined *Lanza* and *Abbate*. See *Benton* v. *Maryland*, 395 U.S. 784 (1969). But the

Court has specifically reaffirmed the dual-sovereignty doctrine after *Benton*, concluding in *Heath* that the doctrine's rationale has "weighty support," both in the Double Jeopardy Clause's use of the word "offence" and in the "historical understanding and political realities of the States' role in [our] federal system" of government. 474 U.S. at 92. And since *Heath*, the Court has repeatedly recognized the doctrine's continuing validity. *E.g.*, *Sanchez Valle*, 136 S. Ct. at 1870; *United States* v. *Lara*, 541 U.S. 193, 197 (2004); *Koon* v. *United States*, 518 U.S. 81, 112 (1996); *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 782 n.22 (1994); *Wheeler*, 435 U.S. at 330; *Rinaldi*, 434 U.S. at 28.

Petitioner also fails to present any logical reason why *Benton*'s incorporation of the Double Jeopardy Clause as applicable to the States should affect the dual-sovereignty doctrine. A defendant who claims a right to avoid prosecution by the federal government based on previous prosecution by a State is in the same position irrespective of whether the State itself is subject to the Double Jeopardy Clause. In each case, the defendant is arguing that the Clause prohibits a second trial by the federal government following a state trial. That claim does not in any way depend on whether the State could itself prosecute him a second time for the "same offence." U.S. Const. Amend. V.

Petitioner also contends (Pet. 14-17) that the "dramatic expansion of federal criminal law" is a "seismic shift that calls for reevaluation of * * * the separate-sovereigns exception." But the very point of the dual-sovereignty doctrine is to allow each sovereign to enforce its laws within their respective constitutional spheres, without undue interference from the other. An increase in federal criminal enforcement would mean

that now more opportunities exist for the federal government's actions to impair the "historic right" and obligation of each State to define offenses and punish offenders within their jurisdictions. *Bartkus*, 359 U.S. at 137. If the federal government could prevent a State from vindicating its criminal laws, the Founders' desire to guard against a "centralized government" and the attendant "exercise of arbitrary power" would be frustrated, not safeguarded. *Ibid.*; see *Abbate*, 359 U.S. at 195 (petitioners' rule would "marked[ly]" alter the distribution of crime-fighting authority, as the States "have the principal responsibility for defining and prosecuting crimes").

In any event, it is not clear whether a significant increase in the rate of federal prosecution has actually occurred in areas of overlap with state authority. See Wayne R. LaFave et al., *Criminal Procedure* § 1.2(f), at 106 (4th ed. 2015); Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1 (2012). Under the so-called "Petite Policy," see *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam), the Department of Justice will generally decline to authorize a successive federal prosecution unless it is justified by a substantial Federal interest that was "demonstrably unvindicated" by the prior state prosecution. Offices of the U.S. Att'ys, Dep't of Justice, *United States Attorneys' Manual* § 9-2.031 (2009); see *ibid.* (describing procedures and policies by which a designated Department of Justice official must determine whether a federal case may be brought after a state prosecution). As this Court has recognized, this policy serves to protect "the citizen from any unfairness that is associated with successive prosecutions based on the same conduct" by "limit[ing] the exercise of the

power to bring successive prosecutions * * * to situations comporting with the rationale for the existence of that power." *Rinaldi*, 434 U.S. at 27-29. And in exercising their discretion, sentencing courts can take into account the results of any proceedings before another sovereign. Cf. *Koon*, 518 U.S. at 112 (federal judge may take into account prior acquittal on state charges in assessing whether a downward departure from the United States Sentencing Guidelines). For example, the district court here decided to have petitioner's federal sentence for possessing a firearm as a felon run concurrently with his state sentence for being a prohibited person in possession of a firearm (and concurrently to his state sentences for other offenses). See Judgment 2.

Petitioner contends (Pet. 16-17) that increased cooperation among federal and state prosecutors provides reason to overrule the dual sovereignty doctrine. But federal-state cooperation has long been a "conventional practice between the two sets of prosecutors throughout the country" and has long been a backdrop to the Court's interpretation of the Double Jeopardy Clause. *Bartkus*, 359 U.S. at 123. The Court has also rejected the contention that application of the dual-sovereignty doctrine turns on any showing that the United States or a State have a unique interest in a prosecution. See *Heath*, 474 U.S. at 90-92. Because the Founders "split the atom" of sovereignty, *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring), the only question is whether the prosecuting authorities derive their powers from independent sources of authority. *Heath*, 474 U.S. at 90. If they do, the "circumstances of the case are irrelevant," for one sovereign's "interest in vindicating its sovereign authority through enforcement of its laws by

definition can never be satisfied by another [sovereign's] enforcement of *its* own laws." *Id.* at 92-93. And even when they are cooperating, the federal government and the States also may have different interests in the same conduct. *E.g.*, *Abbate*, 359 U.S. at 195 (conspiracy to dynamite telephone company facilities entails both destruction of property and disruption of a federal communications network); *Bartkus*, 359 U.S. at 121-122, 137 & n.25 (robbery of a federally insured bank).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2018

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* The Solicitor General is recused in this case.